In the Supreme Court of the United States.

OCTOBER TERM, 1922.

SAM W. MASON ET AL. *v.* UNITED STATES OF AMERICA.	No. 117.
HENRY HUNSICKER ET AL. *v.* UNITED STATES OF AMERICA.	No. 104.
E. G. PALMER ET AL. *v.* UNITED STATES OF AMERICA.	No. 111.
ARKANSAS NATURAL GAS COMPANY ET AL. *v.* UNITED STATES OF AMERICA.	No. 112.
B. R. NORVELL ET AL. *v.* UNITED STATES OF AMERICA.	No. 113.
W. H. MATTHEWS ET AL. *v.* UNITED STATES OF AMERICA.	No. 114.
DILLARD P. EUBANK ET AL. *v.* UNITED STATES OF AMERICA.	No. 115.
LYDIA H. MCMULLEN ET AL. *v.* UNITED STATES OF AMERICA.	No. 116.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

These cases, eight in number, arose through bills in equity filed by the United States whereby was sought mainly a quieting of title to the various tracts involved and an accounting for the value of oil and gas taken therefrom.

The lands were withdrawn by an Executive order dated December 15, 1908. The defendants in each case claim under a mining location made *after* that date, asserting that the order did not have the effect of withdrawing the lands from appropriation under the mining laws. An additional contention was that even if the lands were not subject to mining location, the measure of recovery should be the value of the oil and gas less the cost of drilling and extraction. In other words, that the trespasses were not willful but innocent.

There was a reference to a master, who found that the lands were withdrawn from mining location but that the trespasses were not willful. (*Mason* record *No. 117*, pp. 153 to 169.) This was confirmed by the District Court and decrees were entered quieting title in the United States, enjoining defendants from further exploitation of the lands, appointing a receiver to conserve the property, and ordering the payment of the various sums found due as damages. (*Mason* record, 179–184; Opinion R. 169–173.)

Appeals were taken by defendants to the Circuit Court of Appeals and cross appeals by the Government, the latter as to the decree in respect to the

measure of damages. These resulted in affirmance as to all points except the measure of damages, as to which there was a reversal, the court holding the trespassers to be willful and not entitled to any deduction for drilling and operation expenses. (R. 213, Opinion 205–222; 273 Fed. 135, 142, 143.)

In support of the action of the Circuit Court of Appeals we submit these propositions:

I. The withdrawal order contemplated and had the effect of withdrawing the lands from mining location.

II. The damages were properly fixed upon the basis of willful trespasses.

III. The location involved in No. 113, *Norvell et al.* v. *United States*, is inherently bad.

IV. The United States, with respect to the measure of damages, is not bound by the State law of decisions.

ARGUMENT.

I.

The withdrawal order contemplated and had the effect of withdrawing the lands from mining location.

This order reads as follows (R. 132):

> To conserve the public interests, and, in aid of such legislation as may hereafter be proposed or recommended the public lands in townships 15 to 23 north, and ranges 10 to 16 west, Louisiana Meridian, Natchitoches Land Office, Louisiana, are, subject to existing valid claims, withdrawn from settlement and entry, or other form of appropriation.

We say that by its very terms the initiation of any rights under *any law* was prohibited. Language could not be plainer. The phrase "other form of appropriation" means just that, and by analogy the rule is applicable here that prevails in the construction of statutes, namely, that where the language is plain and unambiguous, construction is not necessary or proper. *Caminetti* v. *United States*, 242 U. S. 470, 485.

Further, the contemporary construction of the order, contained in the letter of the same date from the Commissioner of the General Land Office to the register and receiver (R. 133, 134), establishes that mining location, as well as any other form of filing, entry or act attempting to create an inchoate right, was forbidden.

Moreover, the two communications addressed, *prior* to the withdrawal order, to the Secretary of the Interior by the Director of the Geological Survey, demonstrate that the conservation of the oil and gas values in the lands was the object sought to be obtained by the withdrawal. These communications were the basis for the order. (R. 135–138, 139–142.)

We do not propose to follow the appellants in the elaborate argument which they make in an endeavor to show that mining location could be made notwithstanding the withdrawal order. It does not impress us as sound. It did not prevail with the master, the District Court, or the Circuit Court of Appeals.

All the contentions now made by the appellants were considered by the Circuit Court of Appeals and

so effectively met and disposed of as to make extended argument unnecessary and uncalled for.

II.

The damages were properly fixed upon the basis of willful trespasses.

Appellants contend that they are not willful trespassers because before committing the acts of trespass they consulted with reputable lawyers who advised them that they might proceed to make mining locations upon the lands because the withdrawal order, in their view, did not prohibit appropriations under the mining laws, and, further, that the President had no authority to make such a withdrawal. (R. 86, 87.)

But it is undisputed that appellants knew of the withdrawal order and that they went upon the lands well aware that the Government authorities had declared that no claims could be initiated thereon. In the face of this warning, they can not claim to be innocent trespassers. *Goodson* v. *Stewart*, 46 Southern (Ala.) 239, 240; *Chilton* v. *Missouri Lbr. & Min. Co.*, 127 S. W. (Mo.) 941, 944.

Their acts were clearly willful and intentional, done with the purpose to ignore and defy the withdrawal order, and they knew that they were speculating upon the validity of that order. They did not mistake the facts but the law. A mistake of law does not lessen their liability nor make them innocent trespassers. *U. S.* v. *Murphy*, 32 Fed. 376, 383.

That a mistake of law is not a defense against a charge of willful trespass is also established by the

decisions in *Guffey* v. *Smith*, 237 U. S. 101, and *Benson Mining Co.* v. *Alta Min. Co.*, 145 U. S. 428. These cases we think controlling and decisive in the cases at bar.

In the *Guffey case* the defendants were held liable as willful trespassers from the time they became aware of the asserted rights of the plaintiffs under a prior lease. They apparently considered those asserted rights to be unavailing as against them, for in the suit they attacked several provisions of this prior lease as invalid. In other words, they speculated upon the validity of the plaintiff's rights, just as the appellants have speculated upon the validity of the withdrawal order.

In the *Benson Mining Company case*, that company located a mining claim previously located by the Alta Mining Company and for which that company had applied to the Land Department for a patent and had received a final certificate. The trespasser believed it had a right to relocate the land because the Alta Company had failed to do the annual assessment work thereon to enable it to hold the claim. It was held that as the issuance of the final certificate upon the mineral application vested equitable title in the Benson Company, it was not necessary for it to do annual assessment work thereafter. The Benson Company was held liable as a willful trespasser, notwithstanding its apparently honest belief that it could disregard the claim of the other company and extract ore from the land under its own subsequent mining location.

This court, referring to the finding of the trial court, said (p. 434):

> It also found that the entries and trespasses upon the Alta mine were with knowledge of plaintiff's ownership thereof, and that the defendant at the time it received the ores had knowledge that they came from the Alta mine, and were the property of the plaintiff.

To the same effect is *Union Naval Stores Co.* v. *United States*, 240 U. S. 284, cited by the Circuit Court of Appeals. Cf. *Pine River Logging Co.* v. *United States*, 186 U. S. 279.

Durant Min. Co. v. *Percy Consol Min. Co.*, 93 Fed. 166, and *United States* v. *Van Winkle*, 113 Fed. 903, are not contrary to the rule just set forth. They all proceed upon the theory that the mistake was one of fact.

Erroneous advice of counsel in the face of knowledge of an asserted adverse claim is not a defense in cases such as these. *Central Coal & Coke Co.* v. *Penny*, 173 Fed. 340; *Chilton* v. *Missouri Lbr. & Min. Co.*, *supra*.

The case of *United States* v. *Homestake Min. Co.*, 117 Fed. 481, cited by appellants, is not at all similar to the cases now before the court. There, the mining company consulted with the Secretary of the Interior with reference to cutting the timber involved, made a verbal agreement with that official as to the cutting and the price, and proceeded thereunder. Here, the appellants proceeded without consulting any official and in defiance of the order withdrawing the lands.

As the appellants were wilful trespassers, then the measure of damages is the value of the oil and gas in the pipe line when sold, *without* deduction for extraction. *Woodenware Co.* v. *United States*, 106 U. S. 432; *Guffey* v. *Smith*, *supra*.

But if innocent, the appellants would not be entitled to allowance of cost of *drilling*. *United States* v. *Midway Northern Oil Co.*, 232 Fed. 619, 633; *United States* v. *McCutchen*, 238 Fed. 575, 593, 594; *St. Clair* v. *Cash Gold Min. & Milling Co.*, 9 Colo. App. 235, 241, 47 Pac. 466, 468; *Hall* v. *Abraham*, 44 Oreg. 477, 481, 75 Pac. 882, 883.

IT IS, HOWEVER, TO BE BORNE IN MIND THAT NOT ALL OF THE DEFENDANTS SOUGHT THE ADVICE OF COUNSEL, AND ACCORDINGLY THE DEFENSE OF GOOD FAITH IS NOT OPEN TO THEM.

The following are the only defendants who sought advice of counsel:

In case No. 116 (District Court No. 1171), Sam W. Mason, one of four locators, testified that *he* consulted counsel, who advised him that the Roosevelt withdrawal order of December 15, 1908, did not forbid mineral locations, and, moreover, that the President was without power to issue the order. In the same case Cronin testified that on behalf of the lessee, Pure Oil Operating Company, he consulted lawyers who advised him that the locators could make a good lease. "I furnished them an abstract and asked if I had a reasonably good title, that is all that I inquired about." (Mason Rec., pp. 92, 93.)

In case No. 115 (District Court No. 1170) Eubanks testified that he was interested in the location with Gibbs (whose name alone appears on the location notice), and that before the location was made he, Eubanks, consulted counsel who advised him "we had a perfect right to make the mineral locations, that the land was open." (Mason Rec. No. 117, pp. 95–98.)

In case No. 114 (District Court No. 1168) Cronin, who acted not on behalf of the locators but of the lessee, Pure Oil Operating Company, stated that his testimony given in District Court case No. 1171 (No. 116 in this court), with respect to getting advice of counsel, was also applicable here. (Mason Rec. No. 117, p. 99.)

In case No. 104 (District Court No. 1156) Hunsicker, whose name appears on one of the two location notices involved in that suit, testified that before making the location he consulted a lawyer, who told him the President was without power to issue the Roosevelt withdrawal order of December 15, 1908. (Mason Rec. No. 117, pp. 115, 116.)

In case No. 113 (District Court No. 1167) D. Edward Greer, in answering interrogatories, testified to the legal advice given by him and Proctor to Markham, the manager of the Gulf Refining Company. (Mason Rec. No. 113, pp. 64, 78–80.)

This constitutes, we believe, an accurate statement of all the testimony on this subject. It will be seen that comparatively few of the various locators ever sought the advice of counsel.

THE COURT OF APPEALS IN EFFECT FOUND THAT THE VARIOUS LOCATORS WHO SOUGHT THE ADVICE OF COUNSEL DID SO COLORABLY FOR THE PURPOSE OF MAKING A DEFENSE IF EVER SUED. ITS FINDING OUGHT NOT TO BE DISTURBED.

In an action for malicious prosecution, where both malice and want of probable cause must be shown, the defendant is, of course, permitted to show that he sought the advice of counsel in order to prove the existence of probable cause. *Stewart* v. *Sonneborn*, 98 U. S. 187. But testimony of this sort is unavailing if the proof shows that the advice was sought *colorably*. 18 L. R. A. (N. S.) 62.

The same reasoning exists in a suit of this sort. In this case the Court of Appeals in effect found that the locators did not seek legal advice in good faith, but for an ulterior purpose. Its finding ought not to be disturbed. *Lawson* v. *United States Mining Co.*, 207 U. S. 1.

III.

The location involved in No. 113, Norvell et al. v. United States, is inherently bad.

The location was fraudulent, of which the defendants not only had notice but all of them actively participated in the fraud. That the location was made for the benefit of the Gulf Refining Company is apparent. Markham, the general manager of the Gulf Refining Company, approached the president of the First National Bank of Beaumont, Tex., telling him that there was a tract of vacant Government land in Louisiana supposed to contain oil; that he, Markham, had been advised that the company could

locate only twenty acres; that his company was taking up oil lands in that vicinity; and that if the president of the bank and his friends would locate the land the company would lease or buy it. On the very day the location was filed the parties who participated in it, consisting of the officers and employees of the bank, executed a contract with the oil company for the operation of the land. Under this contract the so-called locators were to receive $500 each in the event the land proved to be oil land. The locators had not seen the land, nor did they themselves take part in locating it, but they appointed an agent, one Bell, also an employee of the Gulf Refining Company, to make the location for them.

The placer mining laws, which were extended to lands containing petroleum by the act of February 11, 1897, 29 Stat. 526, provide that locations of not more than 160 acres each by two or more persons, or association of persons, having contiguous claims are permitted, there being a proviso to the effect that "no such location shall include more than 20 acres for each individual claimant." R. S., sec. 2331.

This limitation upon the number of acres one individual may locate necessarily means something, hence "any scheme or device entered into whereby one individual is to acquire more than that amount or proportion in area constitutes a fraud upon the law, and consequently a fraud upon the Government." *Nome and Sinook Co.* v. *Snyder*, 187 Fed. 385, 388.

In *Cook* v. *Klonos*, 164 Fed. 529, it was said by Circuit Judge Ross, delivering the opinion of the court (pp. 538, 539):

> The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators. The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void.

So, in *United States* v. *Brookshire Oil Co.*, 242 Fed. 718, it was said by District Judge Bean (p. 721):

> This is a direct and positive limitation of the amount of mining ground any one claimant may appropriate individually or as a member of an association in any one claim, and he can not evade the law by the use of the names of his friends, relatives, or employes. Any device whereby any one person is to acquire more than 20, or an association more than 160, acres in area, by one discovery, constitutes a fraud upon the government and is without legal support and void.

Tested by this rule, it will be seen how far these appellants have fallen short of proving that they had a bona fide location. There can be no valid location without a discovery. And while the act of March 2, 1911, 36 Stat. 1015, recognizes that a mining claim may be sold prior to discovery, there is nothing in the act to validate a location otherwise invalid, the language of the act being that—

> In no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any *qualified* persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.

It is by no means clear that this act authorizes the sale of more than 20 acres to a single individual, and in no event does it apply to an invalid location or to lands which at the time of the inception of development were withdrawn from mineral entry.

To say that a corporation or a single individual may acquire by transfer prior to discovery any number of mining claims, irrespective of the area

they contain, is to nullify that provision of the placer law which limits the claim to 20 acres to a single individual.

That all the locators, including the Gulf Refining Company, had knowledge of the fraudulent character of this location is plainly apparent from the record. It is therefore submitted that none of them can claim to be innocent trespassers.

IV.

The United States, with respect to the measure of damages, is not bound by the State law of decisions.

It is well settled that the United States is not bound by State statutes of limitation; and if the Government sues and a balance is found in favor of the defendant, no judgment can be rendered against the United States either for such balance or in any case for costs. *United States* v. *Thompson*, 98 U. S. 486.

It has also been held that the statute of a State requiring landowners to fence their lands does not apply to the United States; that the Federal Constitution has delegated to Congress without limitation the power to dispose of and make all needful rules and regulations concerning the public domain; and that the exercise of that power can not be restricted or embarrassed in any degree by State legislation. *Shannon* v. *United States*, 160 Fed. 870. See also, *Utah Power & Light Co.* v. *United States*, 243 U. S. 389.

Such being the law, no reason appears why the Government should be bound by such laws in fixing the measure of damages for trespasses on its public lands.

In *Woodenware Co.* v. *United States*, 106 U. S. 432, which lays down the rule governing the measure of

damages in cases of trespass, it is said that in the case of a willful trespass the trespasser is liable for the full value of the property taken without allowance for expenditures made by him. In that case the court said (p. 434):

> There seems to be no doubt that in the case of a wilful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the State courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin.

It should be observed that the *Woodenware case* arose in Wisconsin, and this court referred to the milder rule in that State, which it did not see fit to follow but followed the rule prevailing generally in this country and in England.

Moreover, it is not entirely clear that the rule in Louisiana is what the appellants claim it to be. They rely upon the decision of this court in *Jackson* v. *Ludeling*, 99 U. S. 513, in which there is an extended discussion of the question of the measure of damages under the Civil Code of Louisiana. It was held in that case that parties in possession of a railroad under fraudulent foreclosure proceedings were entitled to be reimbursed for money spent in repairing the road and restoring it to its former condition. That was in accordance with the provisions of article 2314 of the code, which provides that—

> He to whom property is restored must refund to the person who possessed it, even in bad faith, all that he had necessarily expended for the preservation of the property.

That rule has no application here, because the money spent in exploring for oil was not expended in the preservation of land.

We think that the appellants are peculiarly unfortunate in their citation of *Jackson* v. *Ludeling*, because in that case the court referred to a series of cases in which it was held by the Supreme Court of Louisiana that a person without title going into possession of the public lands of the United States can not set up a claim for improvements against the Government. In one of the cases the court said expressly:

> We are of opinion that this Article of the Code is not applicable to materials used and labor expended in making settlements upon the national domain. No right can be acquired in relation to the public lands except under authority of Congress. (*Hollon* v. *Sapp*, 4 La. Ann. 519.)

The appellants challenge the action of the court in allowing interest from the date of the master's report, on the amount found due the United States. There was no error in this—*Jones* v. *United States*, decided February 27, 1922, 257 U. S. ——.

The decrees, it is respectfully submitted, should be affirmed.

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